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NOTES.

BANKS AND BANKING—STOCKHOLDERS' LIABILITY—ENFORCEMENT AGAINST THE REPRESENTATIVES OF A STOCKHOLDER AFTER DEATH—In a recent federal decision the executors of a stockholder of a national bank were held liable *de bonis propriis* for the statutory liability adhering to the ownership of the stock. The testator had died in 1890; one month later the bank failed. In 1892 the executors paid all the debts proved or then provable under the laws of the State and distributed the residue of the estate in accordance with the terms of the will, without taking refunding bonds, and filed their final account in the probate court of Delaware. The report of the case does not state whether this account was confirmed or not. The stock was never transferred from the name of the testator on the books of the bank. In 1900 the Comptroller made an assessment against the stockholders of the bank. In a suit against the executors and legatees begun in 1902, it was held that,

under Section 5152 of the Revised Statutes, the statutory liability for these assessments attached, by virtue of the insolvency of the bank, even though in fact unknown to the executors, to the estate of the decedent as a charge or lien in favor of the creditors of the bank; that distribution of the estate without discharging such charge or lien was a breach of trust or *devastavit;* that Section 5152, though providing that the decedent's estate and not the executor personally should be liable for the assessment, did not declare that an executor should not be personally liable as a wrongdoer for breach of trust; and that recovery could not be had against the legatees.[1]

This case seems to be an undue extension of the trust fund theory of *Wood* v. *Dummer,*[2] and holds, in effect, that not only the assets of an insolvent corporation but also the private assets of a stockholder of a national bank to the extent of again the par value of his stock, are a trust fund for the payment of the debts of the bank. Yet the obligation or liability, whether held to be contractual or statutory,[3] does not become a debt until an assessment has been made on the stock by the Comptroller of the Currency;[4] after the failure of the bank and up to the time the assessment is payable the liability, while perhaps more than contingent, is not yet fixed[5] and can properly be said to be potential only. Until the assessment is payable no right of action exists upon this liability;[6] nor is the statute of limitations a bar thereto.[7] Now in the case of the death of a stockholder, title to his stock vests in his estate or more properly in his legal representative.[8] The latter, however, is owner in a representative capacity only; and, in the absence of any question of *devastavit,* under Section 5152 of the National Banking Act the liability as owner of the stock attaches to the estate and not to the

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[1] Rankin v. Miller, 207 Fed. Rep. 602 (U. S. Dist. Ct., Dist. Del., 1913).

[2] 3 Mason, 308 (U. S. C. C., Dist. Me., 1824).

[3] In King v. Armstrong, 9 Cal. App. 368 (1908), the liability is held to be "created by law"; in Matteson v. Dent, 176 U. S. 521 (1899), Deweese v. Smith, 106 Fed. Rep. 438 (1901), Christopher v. Nowell, 201 U. S. 216, 225, and Rankin v. Ware, 88 Kan. 23 (1912), it is held to be contractual; in McDonald v. Thompson, 184 U. S. 71, 74 (1901), it is held to be both statutory and contractual. See 18 H. L. R. 620; 25 *Ibid.* 189.

[4] McDonald v. Thompson, 184 U. S. 71 (1901).

[5] Rankin v. Ware, 88 Kan. 23 (1912); Whitaker v. Kershaw, 45 Ch. Div. 320 (Eng. 1890).

[6] Rankin v. Barton, 199 U. S. 228 (1905); Aldrich v. Skinner, 98 Fed. Rep. (1899) 375; Aldrich v. McClaire, 98 Fed. Rep. 378 (1899); Davis v. Weed, 44 Conn. 569 (1878).

[7] McClaire v. Rankin, 197 U. S. 154 (1905); the statute of limitations of the State within which the action is brought applies.

[8] Parker v. Robinson, 71 Fed. Rep. 256 (C. C. A., 1st Cir., 1895); Zimmerman v. Carpenter, 84 Fed. Rep. 747 (1898); Davis v. Weed, 44 Conn. 569 (1878).

personal representative.[9] It is well established that the debts of the decedent are a lien in equity upon all the personal property of the decedent's estate.[10] But such lien exists only in favor of claims or demands which are due and payable or then due and payable at a certain future time.[11] It is difficult, therefore, to see how a stockholder's potential liability, before being fixed and declared due by the Comptroller, can be held to be a "charge or lien" upon the estate of the decedent in the hands of the executor. To hold so it is to regard the receiver of the insolvent bank not only as a creditor, but also as a preferred creditor, before he has even a right of action. Such a result, it is submitted, was not contemplated by the National Banking Act in Section 5151.

The distribution of the estates of decedents is a matter within the peculiar jurisdiction of the State courts.[12] What amounts to a breach of the executor's trust should therefore be a question for the exclusive determination of the State courts, depending, as it often does, upon the procedural statutes applicable to matters of probate in the particular State.[13] Further, a federal court which has taken jurisdiction upon the ground of diversity of citizenship must administer the law of the State in which it sits and is bound by the Act of 1804 [14] to give such faith and credit to the records and judicial proceedings of any State, when proved in the manner specified in the act, as they have by law or usage in the courts of the State from which they are taken.[15] A federal court so sitting is also bound to recognize the State statutes which are applicable.[16] So it seems necessarily to follow that, if an executor administers the estate in the manner required by the law and usage of his State

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[9] Parker v. Robinson, *supra;* Tourtelot v. Finke, 87 Fed. Rep. 840 (1898); Blackmore v. Woodward, 71 Fed. Rep. 321 (C. C. A., 6th Cir., 1895).

[10] Davis v. Vansands, 45 Conn. 600 (1879); Williams on Executors (10th Ed.), 1315.

[11] In Dear v. Allen, 20 Beavan, 1 (Eng. 1855), the Master of the Rolls refused to permit the executors to withhold a portion of their testator's estate or to make other provision to meet a contingent liability upon certain covenants entered into by the testator; in Wentworth v. Chevill, 26 L. J. (Ch.) 760 (1857), the Vice-Chancellor refused to make provision for the contingent liability of the estate for future calls that might be made upon shares held by testator.

[12] Clark v. Guy, 114 Fed. Rep. 783 (1902); Byers v. McAuley, 149 U. S. 608 (1892); but *cf.* Newberry v. Wilkinson, 199 Fed. Rep. 673 (C. C. A., 9th Cir., 1912), where probate jurisdiction was assumed on ground of diverse citizenship.

[13] *Cf.* Robins' Estate, 180 Pa. 630 (1897); Piper's Estate, 208 Pa. 636 (1904).

[14] Rev. St. U. S., §905.

[15] Kansas City, Ft. S. & M. R. Co. v. Morgan, 76 Fed. Rep. 429 (C. C. A. 6th Cir., 1896); Pennoyer v. Neff, 95 U. S. 714 (1877); *In re* Benwood Brewing Co., 202 Fed. Rep. 326 (1913).

[16] Maiorano v. B. & O. R. R. Co., 213 U. S. 268 (1909).

and cannot be charged with *devastavit* in the courts of that State, the validity of his acts as administrator should not be open to collateral attack in a federal court. In our principal case, however, it does not appear whether the executors were guilty of a *devastavit* under the laws of Delaware or not. An executor is discharged only by order of court, and not *ipso facto* by complete administration of the estate.[17] So in absence of such discharge he may be sued at any time within the statutory period for the debts and obligations of his testator. But if he has not been guilty of a *devastavit* in distributing the assets, judgment may be obtained against him only *de bonis testatoriis,* even though execution thereon, as the estate has been extinguished, is bound to be returned *nulla bona.*[18]

P. N. S.

CONTRACT—EMPLOYMENT FOR LIFE—PUBLIC POLICY—By the weight of authority, an officer, director, or agent for a corporation has no implied power to make contracts of employment for life on behalf of its company.[1] But where such contracts are ratified by the board of directors and are supported by a sufficient consideration they will be enforced. So in *Cox* v. *B. & O. S. W. R. Co.,*[2] where the president of the company agreed to employ an injured workman for life, if he proved competent, in return for forbearance to sue, and the contract was ratified by the directors in making a payment to the employee under the contract, it was held good.

These contracts which by their terms contemplate a continuance of the relation of master and servant for the life of the servant have

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[17] Davis v. Weed, 44 Conn. 569 (1878).

[18] Piper's Estate, 208 Pa. 636 (1904).

[1] In Brighton v. L. S. & M. S. R. Co., 103 Mich. 420 (1894), it was held that it was proper for the court below to allow jury to find that two division superintendents, who represented their company on the settlement of a claim for personal injuries, had authority to make such a contract; but in Maxson v. Michigan Central R. Co., 117 Mich. 218 (1898), it was held that a division superintendent had no such implied power, distinguishing the preceding case on the ground that the company ratified the contract by paying a sum of money to the employee. *Accord,* Nephew v. Michigan Central R. Co., 128 Mich. 599 (1901); Laird v. Michigan Lubr. Co., 153 Mich. 52 (1908); Beers v. N. Y. L. Ins. Co., 20 N. Y. S. 788 (1892), nor have trustees, holding office for four years, such power; Carney v. N. Y. L. Ins. Co., 162 N. Y. 453 (1900), president and actuary holding office for four years have no power to make a contract of employment for life; but in Usher v. N. Y. C. & H. R. R. Co., 76 App. Div. 422 (1902), affirmed in 179 N. Y. 544 (1904), a contract of employment for life was held good, since the company had retained the release and thereby accepted the benefit of the contract.

[2] 103 N. E. Rep. 337 (Ind. 1913). Contract provided that "we will in addition give you employment on this road, it making no difference who may own it, as long as you live and prove a competent and worthy man, and, if at any time you are thrown out of employment, you will receive your salary